

FINAL

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U.S. SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
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My name is Jeffrey N. Shane, and I am Assistant Secretary of Transportation for Policy and International Affairs. Thank you for providing an opportunity to testify on the important transportation implications of each of the three referendum options of statehood, independence, and enhanced commonwealth status that the people of Puerto Rico would vote on under the provisions of S. 712.

Let me make perfectly clear that the Department of Transportation fully supports the principle of providing the people of Puerto Rico an opportunity to express their preference on the future political status of Puerto Rico. Further, as the President has noted a number of times, he favors admission of Puerto Rico to the Union as a state, thereby assuring the people of Puerto Rico equal standing with other United States citizens. A number of specific provisions contained in the proposed legislation affect statutory responsibilities of the Department. I will discuss these today. The Department of Transportation, of course, remains willing to work with the Committee and its staff to resolve any remaining issues.

My comments today, as suggested in the Chairman's letter of June 13 to Secretary Skinner, are directed to S. 712 (star print).

STATEHOOD

The statehood option generally envisions admission of Puerto Rico to the Union on an equal basis with all other States. The Department has particular concerns with the following:

(1) Federal Property. Present Coast Guard missions would, of course, continue after statehood. It is not clear, however, whether under the provisions of Section 5(b) of title II (statehood option) in S. 712, lands held by the Coast Guard under private deed or other legal basis not specifically embodied in a statute, order, or proclamation would remain the property of the Coast Guard. We suggest a reformulation of this language to insure that all existing Federal property remains unaffected by the transition to statehood.

(2) The Continental Shelf and EEZ. Section 5(b) of title II (Statehood option) in S. 712, also provides that "the Commonwealth of Puerto Rico (the state) shall have the exclusive right to explore, exploit, lease, possess and use all seabed, natural, and mineral resources lying within the 200 mile economic zone continental shelf boundary around the waters of the Archipelago of

Puerto Rico...." This language confuses three related but separate areas of jurisdiction under international law: (i) the continental shelf; (ii) the exclusive economic zone; and (iii) archipelago waters. More fundamentally, this provision would give Puerto Rico jurisdiction and economic rights far beyond that exercised by the other states in the Union, which are generally limited to a three-mile limit. Two states, Texas and Florida, enjoy economic rights on the continental shelf out to nine miles because of rights retained at the time of their incorporation into the Union. No state, however, now enjoys such economic privileges beyond that nine-mile limit. Thus, the Puerto Rican right to the whole of the continental shelf would go far beyond rights now enjoyed by existing states.

(3) Military Lands. Section 12(b)(1) of title II (Statehood option) in S. 712, provides that "The Commonwealth of Puerto Rico shall always have the right to serve civil or criminal process" within military property. This would be an unacceptable interference with inherent military functions. It is a long-standing principle applied throughout the United States that military commanders have the right (and duty) to control access to military facilities.

INDEPENDENCE

It is apparent that the proponents of the independence option envision the complete withdrawal of all United States forces from the area (Section 5.2, Title III, S. 712). Although exceptions might be negotiated, demands for withdrawal would seriously impair our ability to interdict drugs in the Caribbean. They would also have a major effect on Coast Guard support for the U.S. Navy in maritime defense. The Department defers further comment to the Department of Defense on the impact of Puerto Rican Independence on U.S. national defense.

Although Puerto Rican independence would relieve the U.S. Coast Guard of responsibility for its statutory missions of search and rescue, aids to navigation, marine safety, and protection of the marine environment for the island itself, it would also deprive the Coast Guard of an important base for operations in the Caribbean to perform these missions in other U.S. possessions in the Caribbean. Therefore, we suggest that provision be made in the proposed bill to ensure the maintenance of U.S. interests in these areas.

Section 5.1 raises transitional questions concerning the application of maritime statutes to U.S. citizens of Puerto Rico who choose to give up their U.S. citizenship. As these concepts, related to vessel ownership and crewing, are quite technical and complex, they require further study, and we would be pleased to work with the committee in further evaluating these concerns.

ENHANCED COMMONWEALTH

A general impact on trust funds and regulations would occur under this option. In addition, important issues are raised in Title IV of S. 712 in both the aviation and maritime areas.

Trust Funds:

Under Subpart 11(a) of Title IV (commonwealth status) the Puerto Rico Federal Relations Act would be amended by inserting a new section 59, which would provide for the consolidation of grants made for specific purposes by any department or agency making grants (other than direct payments to individuals) at the request of the Governor of the Commonwealth. Any such consolidated funds could be used for any of the purposes authorized for any of the source funds. Under these provisions, Airport and Airway Trust Funds could be used for non-aviation purposes, the Highway Trust Fund could be used for non-highway or mass transit purposes, and the Aquatic Resources Trust Fund could be used for non-Coast Guard purposes -- all of which would be in conflict with the authorizing statutes of the respective funds. The ability of the specific agencies to ensure the use of these funds for enhancement of specific and intended modal goals would be impaired.

Regulations:

Subpart 4 would require Federal agencies to evaluate all regulations as they affect Puerto Rico and mandates as guidelines for that evaluation the principles of commonwealth outlined in subpart 3. Rules that are not consistent with that policy would not apply to Puerto Rico. This provision would be extremely difficult to administer because of the vagueness of the principles and would appear to threaten regulatory consistency throughout the United States.

Aviation Negotiations:

The major intent of the aviation provisions of the enhanced commonwealth status (Subpart 5 of Title IV of S. 712) is to grant Puerto Rico independent negotiating authority for bilateral air service agreements. Puerto Rico would be authorized to negotiate with foreign governments for air service rights: 1) between Puerto Rico and foreign points for U.S. and foreign flag carrier services; 2) between other U.S. points and foreign points with Puerto Rico as an intermediate service point for U.S. and foreign flag carrier services; and 3) between Puerto Rico and other U.S. points for service by foreign carriers (cabotage rights).

At the outset, I would like to describe Puerto Rico's existing role in bilateral negotiations, and how existing U.S. international aviation policy and practice fully takes account of the special interests of Puerto Rico.

We recognize the legitimate interest of Puerto Rico in being assured a reasonable opportunity to present its views in bilateral aviation negotiations affecting its interests. Currently, a representative from Puerto Rico may participate in an advisory capacity at U.S. bilateral negotiations with other governments, as do representatives of other U.S. civic interests. U.S. aviation negotiators go to great lengths to obtain the views of interested persons at all aviation negotiations in accordance with the statutory mandate under section 1102(c) of the Federal Aviation Act (49 U.S.C. 1502(c)).

In negotiating aviation agreements with foreign governments, the United States, understanding the special importance of air transportation to non-mainland U.S. points and the relationship of air service to overall economic development, attaches special importance to island services. Generally, little or nothing is expected from foreign governments in exchange for the grant of rights for foreign air carriers to serve Puerto Rico. For example, this past year we granted Paris-Puerto Rico authority to Air France, despite the fact that there is no such right in the U.S.-France aviation agreement. Indeed, we could not imagine denying any foreign carrier application for Puerto Rican authority unless there were extremely grave public interest concerns that so required.

As a result of the continuing U.S. policy in support of Puerto Rican air service, out of some 71 U.S. aviation bilateral agreements (excluding those that came into effect by State succession), San Juan is included for foreign carrier service in 17. Only the U.S. cities of New York, Los Angeles, Miami, and Chicago (in that order) are included more frequently than is San Juan. In addition, foreign governments have the option to select San Juan or other Puerto Rican points for service in nine other bilateral agreements, for a total of 26 agreements that permit service to Puerto Rico. (A listing of these bilateral agreements is provided at Attachment A.) We can recollect no case where a foreign government has sought bilateral rights to Puerto Rico and been denied those rights. Virtually all bilateral agreements authorize U.S. carrier service between San Juan and the foreign country.

With respect to actual air service, Appendix B, (attached) shows that San Juan today receives international air service from 39 foreign destinations. Thus, it is our conclusion that current U.S. international aviation policy and law fully address the air transportation needs of Puerto Rico.

I would now like to comment on the aviation proposals contained in S. 712. The proposal that Puerto Rico obtain authority to negotiate bilateral air service agreements raises several concerns. First, as discussed below, cabotage rights negotiated for foreign carriers could have an adverse impact on services between the U.S. mainland and Puerto Rico. Second, air service agreements entered into might not assure U.S. carriers full

reciprocity for services to the foreign country. Finally, we must point out that the grant of bilateral aviation negotiation rights necessarily involves important questions of aviation safety and security, and there is no provision that would assure the maintenance of existing high U.S. standards of aviation safety and security.

Notwithstanding such transportation concerns, we note that the Department of State objects to this provision on more basic Constitutional and foreign policy grounds. In its testimony the Department of State has objected to independent negotiating authority in terms of delegation to another entity of the authority vested in the Executive by the Constitution to conduct and oversee U.S. foreign policy. Also, the Department of State does not acquiesce in any language that would imply a derogation of the President's power to negotiate for and represent the United States, including Puerto Rico, in the area of foreign relations. The Department of Transportation defers to the Department of State on this issue since it pertains primarily to the conduct of foreign relations.

Several questions were raised in the Chairman's June 13, 1989 letter to Secretary Skinner on two issues, denial of service rights to Puerto Rico and cabotage. I would like to respond to your questions.

The letter requested the Department "to supply a list of international carriers who have requested formally or informally additional service and been denied, as well as the reasons for the denial." My staff is unaware of any request that has been denied, although it is possible that there may have been some informal request at some time on which the requester did not follow up.

With respect to cabotage, Section 1108(b) of the Federal Aviation Act (49 U.S.C. 1508(b)) precludes foreign carriers from carrying local "cabotage" traffic between U.S. points. Significantly, at present there is open entry for U.S. carriers in the mainland-Puerto Rico market. Thus, any U.S. air carrier certificated to conduct scheduled services may inaugurate such operations in this market without the need to obtain additional Department authority. Because of this unrestricted U.S. carrier access, we do not believe that conferring cabotage authority in the market to foreign carriers (whether in the context of Puerto Rico negotiating its own bilateral air agreements or otherwise) would lead to any appreciable increase in the level of service now present in the market. Indeed, we believe that were foreign carriers to hold and exercise cabotage authority they would simply draw traffic away from the U.S. carriers now providing such service, and this would likely force some U.S. carriers to cut back their Puerto Rican operations or withdraw from the market altogether. The grant of such cabotage rights would be highly extraordinary under existing international aviation concepts, and we could not anticipate that U.S. carriers would receive

comparable benefits in exchange for cabotage authority at Puerto Rico.

Maritime:

1. Implementation of Federal Policy

Subpart 4 of title IV (enhanced Commonwealth) in S. 712 provides that Federal statutory law is inapplicable in the new commonwealth unless it is consistent with the "principles of Commonwealth" in subpart 3, "has proper regard for the economic, cultural, ecological, geographic, demographic, and other local conditions of the Commonwealth of Puerto Rico," or is specifically made applicable by Congress on the basis of an "overriding national interest,... or any Federal statutory law or provision thereof pertaining to the foreign relations, defense or national security of the United States that requires uniform applicability throughout the United States,..."

This proviso raises serious concerns, because we believe it is likely to create serious difficulties and confusion. The range of Federal statutory law that would be at issue is so extensive that Congress is unlikely to make and pass the number of specific findings necessary to clarify most of these statutes. In the absence of such enacted findings, the statutes would be subject to litigation on the basis of criteria that are extremely vague. The defendants in a drug trafficking case arising out of a Coast Guard boarding, for example, may be expected to argue in court that Coast Guard boarding authority under 14 U.S.C. 89 is not consistent with "maximum cultural and political autonomy" under the "principles of Commonwealth" in Subpart 3.

This section could also be used by Puerto Rico to erode the Jones Act (46 App. U.S.C. 883, 289), which requires that only vessels constructed in the United States, documented under the U.S. flag, and owned by U.S. citizens can be used to transport merchandise or passengers within the coastwise trade. The Administration is on record as being in strong support of the Jones Act. In Public Law 98-563, Puerto Rico was granted a limited exception for the passenger-carrying trade, but such exceptions are rare. Although the Maritime Administration and the Department of Defense could clearly justify retention of the Jones Act under the national security criterion of Subpart 4, Puerto Rico might argue that the Jones Act does not contribute to its accelerated economic development. Thus, it is possible that Congress would have to make a specific determination in order to retain it.

2. Puerto Rico Federal Maritime Commission

S. 712 (Subpart 8 of Title IV (enhanced Commonwealth)) would enable Puerto Rico to establish its own Commission that would exercise exclusive jurisdiction over service, rates, fares, and practices governing the maritime trade between Puerto Rico and the states of the United States.

At the present time, ocean transportation between Puerto Rico and the United States is regulated by the Federal Maritime Commission (FMC), or the Interstate Commerce Commission (ICC) in the case of intermodal through rates. Regulatory reform affecting both the FMC and the ICC has already taken place, giving shippers and carriers competitive freedom on many rate and service matters, and the Administration is proposing additional deregulation of offshore shipping. If Puerto Rico elects to put in place a more restrictive or protectionist regulatory policy, the current U.S. approach would be hindered. In addition, the creation of a third commission could require the repeal of existing FMC and ICC authority in order to avoid confusion and inconsistency in the treatment of rates.

3. Jurisdiction over Maritime Resources

Subpart 9 of title IV (enhanced commonwealth) in S. 712 would exempt Puerto Rico from the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.). The area of exclusion is defined ambiguously as "zones contiguous to the territorial sea of the Commonwealth". This area of exclusion requires a more precise definition. However defined, this exclusion would allow Puerto Rico a special claim to the economic benefits of United States fisheries. This exclusion would also exempt vessels in these waters from safety requirements otherwise applicable to United States waters, an exception that would not appear to be advisable or justified.

This concludes my prepared remarks. I will be happy to answer any questions members of the Committee may have.